The Chartered Institute of Taxation

Advanced Technical

Domestic Indirect Taxation

November 2022

Suggested solutions

Answer 1

Admissions & Experiences

The sanctuary is not a public or eligible body, but all profits are re-invested back into the Sanctuary, and it is managed and administered on a voluntary basis. The admission fees will therefore be VAT exempt (*Zoological Society of London (Case C-267/00) [2002] STC 521*).

Animal experiences represent more than simply admission to the zoo area. In *Twycross Zoo East Midland Zoological Society [2007],* depending on the specific experience purchased, the guest was able to enter an enclosure and feed the animals. The tribunal found there was an element of 'closeness and intimacy' in an animal encounter which would not be experienced by those with a general admission ticket. The Sanctuary's offering is similar to this supply, and therefore standard rated.

Other Income

Income collected for car parking, from the gift shop and café will be mainly standard rated. If the café makes some cold, takeaway supplies or if the gift shop is selling programmes to visitors, these will be zero rated. Donations received will be outside the scope of VAT, provided they are freely given. The Conservation Grant will be non-business income.

VAT Registration

Based on the forecast income, there will be a compulsory registration requirement within the year ended 31 May 2023. Potentially the Sanctuary could register earlier on a voluntary basis, if it chose to do so (see below), but this will involve balancing the benefit of VAT due against VAT recovery.

Partial Exemption

The Sanctuary will be partially exempt and will have the option of using the standard or a special partial exemption method (PESM). A PESM using floor area, staff or cost allocations for example, may lead to increased VAT recovery, though may take time to negotiate. It will be necessary to demonstrate to HMRC the difference between the two methods, with justification as to why a PESM is required for a fair and reasonable recovery of input tax.

In *North of England Zoological Society [2015] SFTD 841*, a successful case was made that animal feed was a cost attributing to both taxable (catering and retail) and exempt (admission) income. The Sanctuary should consider applying the principles of this methodology in its partial exemption calculation.

Capital Goods Scheme (CGS)

The CGS requires adjustment to the initial amount of VAT recovered, to reflect use over time. It applies to construction and civil engineering works exceeding £250,000 +VAT and is adjusted over a ten year period. Where a project covers both business and non-business work, the total spend counts towards the capital goods scheme limit.

As the value of each of the individual projects is below the CGS limit, it is worthwhile considering whether it is beneficial to separate the projects (to recover VAT under partial exemption on a one-off basis) or combine them (to adjust recovery across the ten year period in accordance with the CGS). Where the works are clearly part of one phased project, they should not be artificially separated. If however, there are separate agreements, contractors or some of the phases are optional, there may be scope to consider whether future adjustments under the CGS would be more beneficial.

Recommendation

As the compulsory date of registration (31 May 2023 at the latest) is within 6 months of incurring input tax on the works, it seems unlikely that the Sanctuary would benefit from an earlier voluntary registration. This is because VAT incurred on services within the immediately prior 6 month period will be encompassed by the pre-registration input tax rules. It is therefore recommended that the Sanctuary registers for VAT when it is required to do so.

Assuming that the partial exemption year end coincides with the financial year end of the Sanctuary, using the standard method, the recovery rate for the year ended May 2023 will be 32%, and 47% for the year ended May 2024.

Entering into separate projects would attract recovery of £21,120 (£330,000 x20% x32%) assuming all invoices for work are raised before end of May 2023.

Alternatively, if the projects were combined and works constitute a single project, they would fall within the CGS. Initial VAT recovery would still be based upon the percentage in year one (32%) but would be subject to further adjustment in the next 9 years. Accordingly, under forecast income for Y/e 31 May 2024, the partial exemption recovery percentage would be 47% leading to an additional recovery of £317 (£21,120/10 x (47%-32%) (or £2,852 over 9 years if the recovery rate remains at 47%). Consequently, it would appear (marginally) more favourable to treat the works as a single project. As stated, VAT recovery could potentially be higher under a PESM and it is recommended that this is explored further.

MARKING GUIDE

TOPIC	**MARKS**
VAT on Admissions & N4P status, animal experiences liable to VAT at standard rate and case principles *Twycross Zoo East Midland Zoological Society [2007*] (Credit for any other relevant cases)	2.5
VAT liability of donations, car parking, catering and retail (with ZR potential).	1.5
VAT Registration requirement in Y/E 23	0.5
Partial exemption discussion, use of PESM to maximise, comparison of standard vs special method - *North of England Zoological Society [2015] SFTD 841*case	2.5
Capital good scheme – overview and application of scheme and business/ non-business spend counts towards to limit	2
Capital Goods Scheme – discussion potential benefits of splitting vs combining agreements	2.5
Pre-registration input tax in context of compulsory/ voluntary registration	1
Reasoned recommendation	2.5
TOTAL	**15**

Answer 2

Registration

If Ffion's supplies are taxable and exceed the £85,000 threshold either on a rolling year basis or in the next 30 days, she would be liable to register.

Supplies of services to private individuals

Whilst mindfulness could be seen to aid good mental health, Ffion is not a qualified psychologist and so could not benefit from that exemption as it must be provided by a registered provider of that particular care.

Physiotherapy, provided by a registered healthcare provider is an exempt supply as it is one of 'medical care.' 'Medical care' is taken to mean the protection, maintenance or restoration of health. Ffion however appears to be providing a mixture of services including also nutritional advice and mindfulness.

A number of factors need to be considered to determine whether she is providing a single supply of physiotherapy, or a mix of divisible separate services.

1. What is the paying customer actually purchasing? Are they purchasing a 'whole mind and body experience', or predominantly physiotherapy with 'add-ons'?
2. Are the supplies of nutritional advice/mindfulness etc incidental to the physiotherapy?
3. A single price is offered but is the customer in reality buying distinct separate services?

Looking at Ffion's suggested business plan, she is intending to charge a flat rate fee of £65 for sessions. Where the predominant purpose of this session is seen by the customer as physiotherapy and that is the main reason for choosing Ffion as their therapist, then the other aspects are likely to be considered a minor/incidental part of the session. This would point to the entire fee being VAT exempt. Ffion will not then have a compulsory liability to register at present as her corporate income (see below) is underneath the threshold.

Where the customer has freedom of choice as to the elements they want to purchase and could, for example, choose an entire session comprising nutritional advice, relaxation and general well-being, then the non-physiotherapy supplies would be taxable, and count towards the registration threshold.

Structure of business

In order to structure her business in such a way that she avoids VAT registration, Ffion would need the physiotherapy to be the predominant supply. Factors that could point to that would be contracts with the customers to state that they are being provided with physiotherapy and incidental advice on well-being. A single physiotherapy fee and advertising and promotion of her business pointing to the physiotherapy element would also help to demonstrate this. When providing physiotherapy, each customer would have an individual care plan which would show their individual needs and a record of each session. Given that Ffion estimates the physiotherapy to be three quarters of the session, this does point to it being the main element of the supply.

In general, the legal terms of any contract would be sufficient for VAT. However, Ffion should be aware that if she produces contracts/literature/care plans that do not reflect the economic reality of the situation the liability of her supplies could be subject to challenge. HMRC can look outside of the contracts to determine what supplies are actually made and assess where they would be taxable. (*American Express FTT Case [2019] TC 07347)*. Additionally, if Ffion structures her business in such a way as to obtain a tax advantage, which does not reflect the economic reality of the situation, and it is considered abusive, then HMRC will counter the advantage and impose penalties where they consider there is a deliberate attempt to avoid VAT *(Ocean Finance, Paul Newey case [2020] TC 07844)*.

HMRC are likely to look closely at Ffion's supplies and might take the view that the supplies of nutritional advice and relaxation/mindfulness are not merely ancillary but important services in their own right. Because Ffion states that the customers can decide what they want out of each session, this does indicate a 'pick and mix' type approach for selecting services that they feel are most important. In this

case, based on Ffion's typical session, one quarter of the services provided would be taxable. This needs analysing carefully once she starts to make supplies as she is close to the registration threshold (with £15,000 of the fees to individuals being standard rated supplies, goods to clients of £10,000, and the corporate supplies of £58,000 (see below)). If sessions with clients become more tailored to the mindfulness, then she will likely be over the registration threshold at some point.

Supplies of goods to private individuals

The goods supplied to the clients would be taxable supplies. The lavender spray mist and CD would be standard rated supplies. The edible face cream is unlikely to be seen as a food product and would therefore not benefit from zero-rating as it is not likely to be viewed by the ordinary person as a food product. With all products being standard rated, the '£30 deal' would not pose any technical issues for VAT as 1/6 would be the VAT due, if Ffion is VAT registered (and input tax would be recoverable on all the purchases) . (*M&S Food [2019] UKUT 0182).*

Supplies of services to corporate entities

An all-in-one fee being paid to provide advice on physical and emotional well-being will not be 'medical care' but rather consultancy. There is no mention of the amount of actual physiotherapy that would feature in the daily sessions, so this is likely to be viewed by HMRC as a single composite standard rated supply.

Conclusion

Where Ffion is truly supplying physiotherapy with incidental supplies of nutritional advice/relaxation etc and her documentation reflects that, then there is a good case for her not being required to be VAT registered at present, as her taxable supplies will not take her over the registration threshold. She will however need to monitor the position closely in the future as her business develops.

MARKING GUIDE

TOPIC	MARKS
Registration	
Compulsory liability to register depends on taxable supplies over the threshold, can voluntarily register but she does not want this	½
Types of supplies to individuals	
Physiotherapy by a registered healthcare provider is exempt	1
Does not extend to other types of supplies if not related to that healthcare provider's qualification	1
However, if a composite supply with other care being incidental, all could be exempt	1
If a 'mix' of separate supplies, then individual supplies have their own rates	½
Factors to look at for predominant supply with incidental supplies, eg what the customer is buying – ¾ is Physio (typical contract)	1½
Conclusion if exempt = under threshold and no liability to register	½
If customer has a 'pick and mix' eg no physiotherapy in a session, then single supplies and SR	1
Structure of business	
The contract is the starting point for determining VAT liability	1
If physiotherapy actually main element, contracts, advertising, care plans all point to this. ¾ of the session is physiotherapy. Conclusion on what evidence she is likely to present	2
Documentation should reflect economic reality of the situation (with ref to case law)	1½
Documentation not reflecting economic reality - could be subject to challenge by HMRC	1
Not to produce deliberate artificial documents – abuse and tax advantage cancelled (ref to case law)	2½
HMRC might argue, in any event single supplies and she is liable to register with products and consultancy work	1
Supplies of goods	
All SR – edible face cream not a food	1
£30 deal not pose an issue like M&S case	1
Supplies to corporate entities	
Not physiotherapy but consultancy so SR on entire fee	1
Conclusion based on above	1
TOTAL	**20**

Answer 3

Where Leewood House is wholly residential the SDLT will be higher. Non-residential properties, which include 'mixed use' properties are treated as non-residential and liable to lower SDLT. 'Wholly residential land' means buildings and land suitable for use as a dwelling. A 'mixed use' property means one that contains both residential and non-residential elements.

Potentially this could be a 'mixed use property', due to the large barn being partly used as an office in the grounds; the two acres of land that are let to a farmer, and the marketing by the estate agents that it could present a great 'business' opportunity.

The rental income from the sheep is not significant and the income is being used to defray the expenses of having the sheep on the land. This suggests it is nominal income and not a genuine business activity. The entire purchase price should therefore be liable to the residential rates. There have been various cases recently (eg Hyman and Goodfellow *[Cases joined in Upper Tribunal in 2021 UKUT 0068].* that have considered what amounts to a residential property and may be supportive of this interpretation.

Purchase by Propz Ltd ('Propz')

If Propz buys Leewood House, the SDLT will depend on its use.

Companies pay an additional 3% rate on all purchases of residential properties unless the consideration is more than £500,000 and then a 15% rate can apply.

As the fittings take the value over the £500,000 limit, it is vitally important to have separate contracts concluded (one for the actual property and a separate one for the contents). HMRC will want evidence that the value placed on the fittings is accurate and that this is not an artificial transaction. If a single price of £510,000 was paid, then at 15% the SDLT could be £76,500, compared with £29,200 (see below).

There are some exclusions from the 15% rate were it to be in point. One is where properties are used in certain 'relievable trades', including a property bought exclusively for a property rental business. If Propz rented out the entire property, then this would be satisfied. However, occupying the barn itself for its own staff training and conferences would jeopardise the relief *(Consultus Care case [2019] TC07251).*

In addition, there is a relief for 'dwellings' that are made available to the public. Unfortunately, if the property is converted to a bed and breakfast then the relief would not apply. This is because hotels and similar establishments are excluded from the definition of a 'dwelling'. *(Goode Cuisine Company Ltd case [2018] UKFTT 163)*

On the basis the 15% rate doesn't apply, the SDLT will be:

Consideration	**Rate**	**Band**	**Amount**
£490,000	Up to £125,000	3%	£3,750
	Next £125,000	5%	£6,250
	Next £240,000	8%	£19,200
		Total	**£29,200**

Purchase by Albert of Leewood House

If Albert buys the house himself, the SDLT will be as follows:

Consideration	**Rate**	**Band**	**Amount**
£490,000 (Note 1)	Up to £125,000	0% (Note 2)	£0
	Next £125,000	2%	£2,500
	Next £240,000	5%	£12,000
		Total	**£14,500**

Notes:

1. The removable furnishings are not part of the consideration for the house itself and not liable to SDLT, provided a separate contract is agreed with the vendor for these items (as above).

2. He is not a first-time buyer as he previously owned a house. Therefore, he will not benefit from the first-time buyers' relief which would make the SDLT nil on £300,000 and the rest liable to 2%. The additional 3% rate will not apply to the purchase as this is his only home. In addition, as the 'granny annexe' does not make up more than one third of the purchase price, it will not be treated as a purchase of two separate dwellings for the purposes of the additional 3% rate.

Potentially Albert would be able to take advantage of 'multiple dwellings relief' (MDR). Although the additional 3% rate does not apply to the annexe, this does not preclude it being treated as a 'separate dwelling' for MDR. In Albert's case he is not likely to be able to use MDR as where the annexe is not capable of being used separately from the main house, the whole property is treated as a single dwelling. (*[Doe [2021] TC06712 Partridge [2021] UKFTT6]).* In this case as the access to the annexe is through the main house MDR is unlikely to apply.

If Albert moves in, the date the SDLT becomes due is the date of exchange and not the later date of completion and payment and a return would be due within 14 days of the date of exchange.

(Examiner's Note – references to cases are supportive and for future candidates. No need to name to gain full credit).

MARKING GUIDE

TOPIC	MARKS
Principles applying to both scenarios	
Difference between higher residential and lower non-residential SDLT and need to identify what this purchase would be	½
Wholly residential and meaning of 'mixed use'	1
Cases applied to the scenario	1
Conclusion on whether residential or not	1
Part 1a) purchase by Propz Ltd	
Additional 3% rate	½
15% rate – consideration over £500k	1
Separate contract and accepted by HMRC as not artificial	½
Relievable trades/ Bed and Breakfast impact	1½
Calculation of SDLT	1
Part 1b) purchase by Albert	
Calculation of SDLT	1
Removable furnishings and separate contract	1
Not a first time buyer	½
Consideration of additional 3% rate	½
Granny annexe not treated as second dwelling	1
Multiple Dwellings Relief	1
conclusion that MDR is not available	1
Substantial performance impact on payment and return	1
TOTAL	**15**

Answer 4

Points as Vouchers

The first question is whether the Points count as vouchers (Sch 10B VATA 1994). A voucher is an instrument which can be in physical or electronic form. The definition of voucher has three elements:

(i) A person is under an obligation to accept the instrument as payment for goods or services,
(ii) The persons who are obliged to accept the voucher as consideration for those goods and services are limited; and
(iii) The instrument is transferable by gift.

The Points have the substance of vouchers. They can be exchanged for cash and are specific to an employee but may not be transferable in the sense required by law.

Output tax

If the Points are vouchers, they are multi-purpose vouchers (MPVs) and there is no VAT on issue because the amount of VAT due on redemption is uncertain. Instead, VAT is accounted for on the redemption of the vouchers.

A further possibility is that the issue of the vouchers is outside the scope of VAT, because the exchange of £1 for £1 is not a supply. A similar argument may be made in the event that the Points are not regarded as vouchers.

The fees may be consideration for a supply which is separate from the supply of the Points. On the other hand, the supply of the scheme and the supply of the Points may constitute a single overall supply, for which Rewards is remunerated by the taxable fees which it charges. It will be a single overall supply if the supply and operation of the scheme to the employer, and the supply of Points to specified employees, are regarded as legally and economically dissociable.

Input tax

Rewards does not incur VAT on the high street vouchers which it purchases (these being multi-purpose vouchers) but it pays VAT on the goods and services listed in the Catalogue and supplied without consideration in exchange for Points (though its costs will have been refunded by the employer). To be able to recover this input tax it must show that the there is a direct and immediate link between the input transaction and a taxable output transaction.

Time limits for assessments

An assessment must be made after the later of

- Two years after the end of the prescribed accounting period
- One year after evidence of facts, sufficient to justify the making of the assessment, comes to the knowledge of HMRC

Provided that in the latter case the assessment is not made more than 4 years after the end of the prescribed accounting period.

Recommended Action:

Rewards should write to HMRC within 30 days seeking a statutory review, contending:

1) The Points have all the substantive attributes of vouchers as defined in Sch 10B, VATA 1994:
   - Rewards is obliged to accept the Points in exchange for goods and services
   - In so far as exchangeable for cash the Points are outside the VAT system
   - As vouchers the Points are multi-purpose vouchers, in that the VAT treatment of the goods or services obtained on exchange is not certain at the time of issue

Accordingly, VAT on the issue of the Points should be disregarded.

2) Alternatively, if the Points are not classified as vouchers, the issue of the Points will not constitute the performance of a service for consideration. It is simply an exchange of £1 for £1. The issue of the Points is simply part of the service of providing and administering an employment benefits scheme, for which the supplier is remunerated by separate fees charged to the customer, on which VAT is charged.

3) In respect of the alternative assessment, in securing the provision of the Catalogue goods and services, Rewards is carrying out the terms of its contract with the employer. These services are provided for fees which are chargeable to VAT. These fees are related to usage, so the issue of Points is reflected in and remunerated by these fees. Accordingly, in order to fulfil the terms of the contract Rewards has to secure the provision of the Contract goods and services. Consequently, the input tax incurred is directly attributable to the making of taxable supplies.

4) This analysis follows from the decision of the Supreme Court in In *R & C Comrs v Loyalty Management UK Ltd* ('LMUK') [2013] STC 784 the Supreme Court held that payments which LMUK made to suppliers of goods and services ('R') which R provided without charge to participators in a customer loyalty scheme, were payments by LMUK for a taxable service provided by R to LMUK. In *Loyalty Management* HMRC argued that the reimbursement of these costs paid by the sponsors of the customer loyalty plan was third party consideration received by LMUK. Third party consideration is consideration which B is paid by A, in return for a supply made by B to C. B must account for VAT on third party consideration. Here HMRC may argue that the refund of costs made by the employer to Rewards Ltd is third party consideration. That argument was rejected in *Loyalty Management.* The situation is exactly the same here.

MARKING GUIDE

TOPIC	**MARKS**
Explain the law relating to vouchers	4
Consider whether vouchers are supplied here	3
Analyse arguments relating to output VAT liability in this case	3
Analyse arguments relating to input VAT recoverability in this case	3
Explain conditions for recovery of input tax	2
Demonstrate familiarity with appeals process, time limits for assessments (in time), appeal within 30 days	3
Conclusion as to why assessments are/are not valid	2
TOTAL	**20**

Answer 5

Liability of Supplies

In order to consider the application of the standard method to Aachen Bank ('the Bank'), it is first necessary to consider the liability of its supplies.

1. Securities Trading centre - dealing

   The UK supplies are exempt. The overseas supplies are treated as taxable supplies (see below).

2. Corporate finance – advisory

   The UK supplies are taxable. The overseas supplies are outside the scope but treated as taxable supplies.

3. Lending – making and servicing loans

   The UK supplies are exempt. The overseas supplies are treated as taxable (see below).

4. Foreign exchange - dealing

   There is case law whereby some FOREX transactions are not treated as supplies. This is dealing in foreign exchange so is a business activity, which is exempt in the UK but services undertaken for non-UK clients are treated as taxable (see below).

Standard Method

The Bank makes both taxable and exempt supplies. Any input VAT which is directly attributable to taxable (or deemed taxable), or exempt supplies, is first accounted for. Input VAT which is attributable to overheads is attributable to both taxable and exempt supplies. This unattributable residual (or "pot") input tax has to be split between taxable supplies and exempt supplies by means of a partial exemption method. The standard method of doing this is by reference to turnover. Any method other than a standard method is a special method (SPEM).

Standard and SPEMs alike have to satisfy the criterion of producing 'a fair and reasonable attribution of input tax': s26(3) VATA 1994. The regulations are VAT Regulations regs101 – 110. If a method fails to produce a 'fair and reasonable' result, HMRC may override the method.

Two types of outside the scope supplies are treated as taxable supplies:

1. Foreign supplies. Input VAT attributable to supplies made to a business customer established abroad which would be taxable supplies if made to a person established in the UK, is recoverable. [s 26(2)(b) VATA 1994]

2. Specified exempt supplies. Input tax is recoverable on supplies made to persons established outside the UK, which if supplied to a person established in the UK, would be exempt by reason of Sch 9, Group 5, Items 1 – 8 (Finance) [s 26(2)(c) VATA 1994; VAT (Input Tax) (Specified Supplies) Order, SI 1999/3121].

Supplies to customers established in the EU have since 1 January 2021 been classified as outside the scope supplies, and so qualify for this extended recovery of input tax.

In the case of the Bank foreign supplies and specified exempt supplies would be included in the total of taxable supplies.

Supplies which fall within item 1 or 6 of Group 5 of Schedule 9 are not included in the standard method. Instead input VAT is recoverable based on 'use'.

Special Methods

The standard method does not require HMRC consent.

In this case HMRC have directed that the Bank should adopt a SPEM. These could be based on turnover of each sector; staff engaged in activities; or floorspace.

Methods based on floor-space are usually not acceptable to HMRC.

Methods based on the budgeted figures for the year ending 31 March 2023, and residual input figure for the year to 31 March 2022 could be:

(i) Staff engaged:

Profit centre	Staff engaged	Recoverable VAT calculation	Recoverable VAT(£m)	Residual recovery rate
Securities trading	20/100	30 x 0.2 x 0.2	1.2	
Corporate Finance	10/100	30 x 0.1 x 1.0	3.0	
Lending	40/100	30 x 0.4 x 0.1	1.2	
Foreign exchange	30/100	30 x 0.3 x 0.5	4.5	
			9.9	33%

(ii) Floor space

Profit centre	Floor space	Recoverable VAT calculation	Recoverable (£m)	Residual recovery rate
Securities trading	15/100	30 x 0.15 x 0.2	0.90	
Corporate Finance	30/100	30 x 0.3 x 1	9.00	
Lending	35/100	30 x 0.35 x 0.1	1.05	
Foreign exchange	20/100	30 x 0.2 x 0.5	3.00	
			13.95	46.5%

(iii) Sectorised Turnover

Profit centre	Turnover	Recoverable VAT calculation	Recoverable (£m)	Recoverable
Securities trading	90/350	30 x 90/350 x 0.2	1.54	
Corporate Finance	20/350	30 x 20/350 x 1	1.71	
Lending	150/350	30 x 150/350 x 0.1	1.29	
Foreign exchange	90/350	30 x 90/350 x 0.5	3.86	
			8.4	28%

For a bank with a significant proportion of taxable and foreign business, HMRC are most likely to accept the sectorised turnover method as fair and reasonable though it may be worth looking to negotiate on one of the other methods (e.g., staff engaged), as this results in a better recovery.

MARKING GUIDE

TOPIC	MARKS
Requirement 1	
Explain the law relating to partial exemption standard method and 'use' for certain supplies	2
Classification of different types of supply for VAT	2
Knowledge of recoverability of input tax on outside the scope supplies (specified exempt/foreign supplies)	2
Distinction between standard and special partial exemption methods	2
Requirements of special method, floor space not usually accepted	2
Requirement 2	
Calculate and advise on preferred method	5
TOTAL	**15**

Answer 6

Three issues arise:

(i) Can one and the same product have two different classifications for VAT?
(ii) Is Zing Oil correctly classified as 'Food'?
(iii) Does the supply of Zing Oil dispensers constitute a composite or a mixed supply?

Can one and the same product have two different classifications for VAT?

The supply of goods will generally be standard-rated.

'Food of a kind used for human consumption'. is however zero rated (item 1 Group 1 Sch8 VATA 1994).

From this legislative description it appears that 'Food' for VAT purposes is not just something which humans can eat. It must be something which is recognised as ('of a kind') and in general use ('used') for human sustenance. The way in which it is held out for use will also be a factor in this (see below).

'Food' can include liquids as well as solids - Note (1) states: '"Food" includes drink'.

Accordingly, when sold as 'Perfumiser', Z Oil will not be 'Food' because in that guise it will not generally be regarded or used as food. The fact that it may in a different guise be classified as 'Food' is irrelevant. Accordingly, it is correctly standard rated.

Is Zing Oil 'Food'?

Zing Oil is not "eaten" as food as such. It is simply used to dress food in the form of salads. However, the same could be said of tomato ketchup. While not consumed by itself, Zing Oil will be eaten together with items which are undoubtedly 'Food'. Unlike 'confectionery' (Excepted Item No 2) it is not consumed by itself, in isolation from other items of Food and it is not similar to any Excepted item.

Caselaw

The way in which a product is marketed is important for determining its VAT classification, together with its inherent characteristics. This is apparent from the decided cases on the question whether a particular item is to be classified as zero-rated food or as something else (eg whether Jaffa cakes were to be classified as zero-rated 'cake' or standard-rated chocolate biscuits: *United Biscuits (UK) Ltd v C & E Comrs* VAT (1991)).

The courts are required to adopt a multi-factorial approach: *Procter & Gamble UK v R & C Comrs* [2009].

Six main factors, largely overlapping, are identified in categorisation cases are:

- Ingredients
- Manufacturing and processing
- Appearance and taste
- Packaging and marketing
- Purpose for which supply made and received
- Perception of the typical consumer

In *R & C Comrs v Roger Skinner Ltd* [2014] STC 2335, the question was whether animal feedings stuffs primarily intended for working dogs, but which could also be used for feeding pet dogs, were zero-rated or standard rated. The taxpayer held out its product to be especially suitable for working dogs. The FTT decided they were animal feedings stuffs and zero-rated. Newey J observed in the Upper Tribunal: '*What is of key importance is how the product is held out for sale'.*

Phoenix Foods Ltd v R & C Comrs [2018] UKFTT 018 concerned the classification of bicarbonate as soda, which could be used both as a cleaning ingredient and as a baking ingredient. The Tribunal held that when it was packaged and sold as a baking ingredient it was food, notwithstanding that it could be used for other purposes.

The container

In considering whether there is a composite (single), or a mixed supply, the courts have applied two approaches:

(i) Whether there is a principal supply and an ancillary supply, which takes the character of the principal supply: *Card Protection Plan Ltd v C & E Comrs* [1999]

(ii) Whether there is a single overall supply: *College of Estate Management v C & E Comrs* [2005].

As Zing Oil is a liquid, it has to be sold in a container. The container, however, is something more than a simple container, as the label indicates. A high proportion of the selling price (28-40%) is attributable to the dispenser, and the dispenser is not 'Food'. As the container costs more than £1 the 'linked goods concession' [VAT Notice 701/14, Food, para 6.1] does not apply. However, the dispensers are not separately priced and not available except through the purchase of Zing Oil.

As the cases indicate, the perception of the typical consumer is important. It would be useful for the company to undertake some customer surveys to show that the customers were buying food dressing plus a container, rather than a dispenser plus food dressing. If HMRC ever questioned the position, this would be useful material to have.

If the marketing material doesn't place any special emphasis on the various uses to which the container can be put, and in particular if the company has evidence to show that the special dispenser has specific advantages in relation to the Zing Oil food product itself, it is unlikely that HMRC could successfully contend that there was a mixed supply.

Accordingly, the VAT compliance of Kitchen Oils Ltd may be regarded as correct in all these aspects.

MARKING GUIDE

TOPIC	**MARKS**
Definition of 'Food' for VAT purposes	3
Whether same product can have different VAT classifications	2
Apt reference to case-law	4
Consideration of evidence	3
Distinction between composite and mixed supplies – *HMRC Notice not required for marks*	3
TOTAL	**15**